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No. 90-1776

In The

Supreme Court of the United States

October Term, 1990

PAMALEE CHAMBERS,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NANCY J. ANDERSON
Attorney
1010 N. St. Mary's, Rm 1403
San Antonio, Texas 78215
(512) 222-3033

Attorney for Southwestern Bell Telephone Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Southwestern Bell Telephone Company ("SWBT") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Pamalee Chambers, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on February 25, 1991.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

Petitioner, Pamalee Chambers, filed suit against her former employer, Southwestern Bell Telephone Company (hereinafter "SWBT"), in the United States District Court for the Western District of Texas, Austin Division alleging SWBT wrongfully discharged her in retaliation for her having filed two racial harassment charges with the Equal Employment Opportunity Commission (hereinafter "EEOC"). Originally Chambers sought relief under both Title VII, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. Before trial, Chambers abandoned her claim under Title VII. *Chambers v. Southwestern Bell Telephone Co.*, 917 F.2d 5, 6 (5th Cir. 1990)

On January 30, 1989, SWBT moved to stay proceedings pending the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). After the district court denied the motion, the case proceeded to trial by jury that found SWBT had retaliated. On June 15, 1989, the Supreme Court held in *Patterson* that a claim for post-contract formation activity could not be brought under 42 U.S.C. § 1981. SWBT appealed to the Court of Appeals for the Fifth Circuit which agreed in a published opinion that *Patterson* applied retroactively to bar the claim. *Chambers*, 917 F.2d at 7. Upon rehearing, the Fifth Circuit was unpersuaded that Chambers' circumstances were so unique or worthy as to entitle her to a prospective application of *Patterson*. Following the Fifth Circuit's denial, Petitioner sought a Writ of Certiorari from this Court.

STATEMENT OF FACTS

SWBT strongly disagrees with the Petitioner's version of facts. Chambers, a white female, was dismissed by Mr. Gaubatz, a white male, because she placed numerous, excessively abusive and harassing personal phone calls from work to Mr. and Mrs. Campos, the same people she had been warned not to call again or her job would be in jeopardy. Initially she denied making the calls. Upon learning that SWBT had successfully traced the calls from Chambers' work area, she admitted making them, but she claimed they were not harassing.

There was no evidence that Chambers' race was a motivating factor in this discharge. Instead Chambers argues that her discharge was the result of filing two EEOC charges nearly two years earlier concerning a black female manager in a different city and in a different chain of supervision from that at the time of discharge. Although no mention of the EEOC charges was included in her personnel file that followed her when she transferred from Corpus Christi to Austin, Texas, various supervisors' comments about her work were included in this file. None of the supervisors present at the time of the discharge had any knowledge that Chambers had filed EEOC charges at any time in the past.

Contrary to what Chambers maintains in her Petition for Writ of Certiorari at page 6, employees may review their files at any point during their careers. Chambers was not prevented from seeing her file and she, in fact, had conducted several reviews of her file as evidenced by

the entry log. Moreover, in response to supervisors' comments, she wrote memoranda that were included in this file. Chambers' discharge was clearly and unequivocally unrelated to any racially motivated retaliation.

In addition, Chambers failed to complain to the EEOC about her discharge and pursue a Title VII action to judgment. In an attempt to salvage her claim after the *Patterson* decision, Chambers claims she relied solely on *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982). She argues that this reliance and the fact that she otherwise would have no remedy, together, suffice to satisfy the criteria established in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to preclude the retroactive application of *Patterson*.

REASONS FOR DENYING THE WRIT

Contrary to Petitioner's assertions, her circumstances do not meet the three prong test in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to avoid a retroactive application of *Patterson*. There is no significant equity in Chambers' favor to justify applying the exception to the general rule that judicial doctrines are applied retroactively. As discussed below, none of the reasons asserted by Petitioner warrants granting of the Petition for Writ of Certiorari.

ARGUMENT

In asking this Court to revisit the Fifth Circuit's decision to apply *Patterson* retroactively, Chambers overlooks the law and its application to her facts. This Court ruled in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) that judicial doctrines are applied retroactively unless it can be shown that the decision establishes a new principle of law, that the purpose of the new principle of law would not be retarded in non-retroactive application, and that retroactive application would produce substantial injustice or hardship. *Chevron*, 30 L.Ed.2d at 306.

The first *Chevron* factor is not in dispute because the Court in *Patterson* established a new principle of law in the Fifth Circuit.

> We hold further that racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.

Patterson, 105 L.Ed.2d at 147 (1989). Prior to *Patterson*, the Fifth Circuit permitted recovery under § 1981 for conduct occurring after contract formation. *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982). After *Patterson* in *Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990), the Fifth Circuit concluded that *Patterson* overruled *Goff*.

> We have questioned, but never decided, whether *Goff* survived *Patterson*. *See Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989). We now hold that it does not. *See, e.g., Brown v. United States*, 890 F.2d 1329, 1336 & 1339 (5th Cir.

> 1989) (overruling a prior Fifth Circuit opinion because a subsequent Supreme Court case was implicitly inconsistent with it.)

Carter, 912 F.2d at 840. In short, post-contract formation conduct is no longer actionable under § 1981. *See also, Brown Group, Inc. v. Hicks*, ___ U.S. ___, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991) and *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991)

The Fifth Circuit properly determined that Chambers had not satisfied the remaining two *Chevron* factors. Chambers' circumstances do not support the other *Chevron* factors because the purposes of *Patterson*, § 1981, and Title VII, are furthered by retroactive application, and substantial injustice does not result from such ruling.

This Court corrected previous decisions when it decided in *Patterson* that § 1981 has a very limited scope. To allow Chambers' cause of action under § 1981 to survive *Patterson* would broaden the narrow scope and encourage further litigation that should be pursued under Title VII. The Fifth Circuit further explained in *Carter* the reasons that § 1981 does not extend to retaliatory termination. From its inception, Title VII has always provided the means by which an aggrieved employee may seek relief.

> . . . we should not interpret Section 1981 to duplicate that protection (provided by Title VII) unless the overlap is . . . "necessary." *See Patterson*, 109 S.Ct. at 2375. . . . Because section 1981 no longer covers retaliatory termination, all suits for discriminatory dismissal must be brought under Title VII. (parenthetical reference added)

Carter, 912 F.2d at 840-841.

Chambers points to her reliance on *Goff* as the main reason this Court should grant relief. Chamber's reliance on *Goff* was inconsistent with the fact that this Court had already granted a writ in *Patterson* on October 5, 1987, and had asked for reargument on April 25, 1988 – both clear signals that reliance on the former law was risky at best. *See, Patterson,* 484 U.S. 814, 108 S.Ct. 65, 98 L.Ed.2d 29 (1987) and 485 U.S. 617, 108 S.Ct. 1419, 99 L.Ed.2d 879 (1988). In balancing a party's reliance on previous law and the furtherance of the purpose of the new rule, the latter should be given greater weight. The Fifth Circuit recognized this Court's determination to preserve the procedures and remedies of Title VII. *Carter,* 912 F.2d at 838; *Lavender v. V & B Transmissions and Auto Repair,* 897 F.2d 805, 807 (5th Cir. 1990).

Next, Chambers argues that retroactive application of *Patterson* results in injustice. This is not persuasive when considering that she voluntarily chose to abandon her Title VII action. That she eliminated the only theory that could potentially have provided her with a remedy to rely solely on *Goff* is not explained by Petitioner. Nevertheless, she made no attempt to revive her Title VII allegations after SWBT urged the Court to wait for the Court's ruling in *Patterson*. It would be inequitable to subject SWBT to a cause of action that is not permitted under § 1981.

> But the Supreme Court itself applied its decision retroactively to Brenda Patterson, denying her section 1981 claim. Patterson, like Carter and Jackson, chose, for unknown reasons, to pursue a remedy only under section 1981 and not under Title VII. *See Patterson,* 109 S.Ct. at 2375. Because

> the Supreme Court applied its holding retroactively to a similarly situated individual, rather than announcing a rule of prospective application, the appellants would have a difficult time proving that retroactive application of the same decision would be unfair.

Carter, 912 F.2d at 838.

Finally, regardless of what other claims or remedies a party has available, the Circuit Courts have consistently applied *Patterson* retroactively. *See: Rossy v. Roche Products, Inc.*, 880 F.2d 621 (1st Cir. 1989); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2nd Cir. 1990); *Tadros v. Coleman*, 898 F.2d 10 (2nd Cir. 1990); *Williams v. Giant Eagle Markets, Inc.*, 883 F.2d 83 (3rd Cir. 1989); *Matthews v. Freedman*, 882 F.2d 83 (3rd Cir. 1989); *Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990); *Young v. City of Houston, Tex.*, 906 F.2d 177 (5th Cir. 1990); *Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 275 (5th Cir. 1990); *Lavender v. V & B Transmissions and Auto Repair*, 897 F.2d 805, 807 (5th Cir. 1990); *Carroll v. General Acc. Ins. of America*, 891 F.2d 1174 (5th Cir. 1990); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989); *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475 (6th Cir. 1989); *Bailey v. Northern Indiana Pub. Service Co.*, 910 F.2d 406 (7th Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991); *Lynch v. Belden and Co., Inc.*, 882 F.2d 262 (7th Cir. 1989); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990); *Overby v. Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989); *Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877 (10th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990); and *McGinnis v. Ingram Equipment Co., Inc.*, 888 F.2d 109 (11th Cir. 1989).

CONCLUSION

In effect Chambers has petitioned to have this Court decide an issue that has no merit in light of *Patterson* and in light of the *Chevron* factors. Retroactive application by the Court in this case, as in *Patterson*, preserves and enforces the clear and simple meaning of § 1981. Moreover, if *Patterson* were ignored, Title VII and its associated administrative procedures would be totally undermined. *Patterson*, 105 L.Ed.2d at 153; *Carter*, 912 F.2d at 840; *Lavender*, 897 F.2d at 807. Finally, Chambers cannot persuasively advance the argument of detrimental reliance when the writ in *Patterson* had been granted and SWBT placed her on notice that it would control the outcome of this case. For all of the foregoing reasons, Respondent, Southwestern Bell Telephone Company, respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

NANCY ANDERSON
1010 N. St. Mary's, Rm 1403
San Antonio, Texas 78215
(512) 222-3033
(512) 222-7194 (fax)
TX State Bar No. 01199750